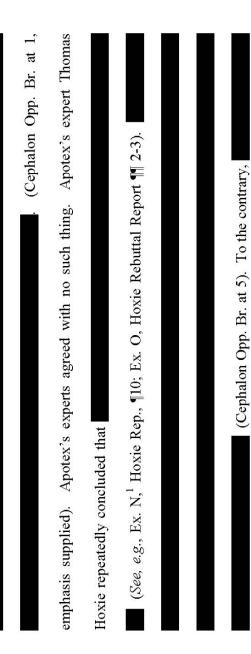
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

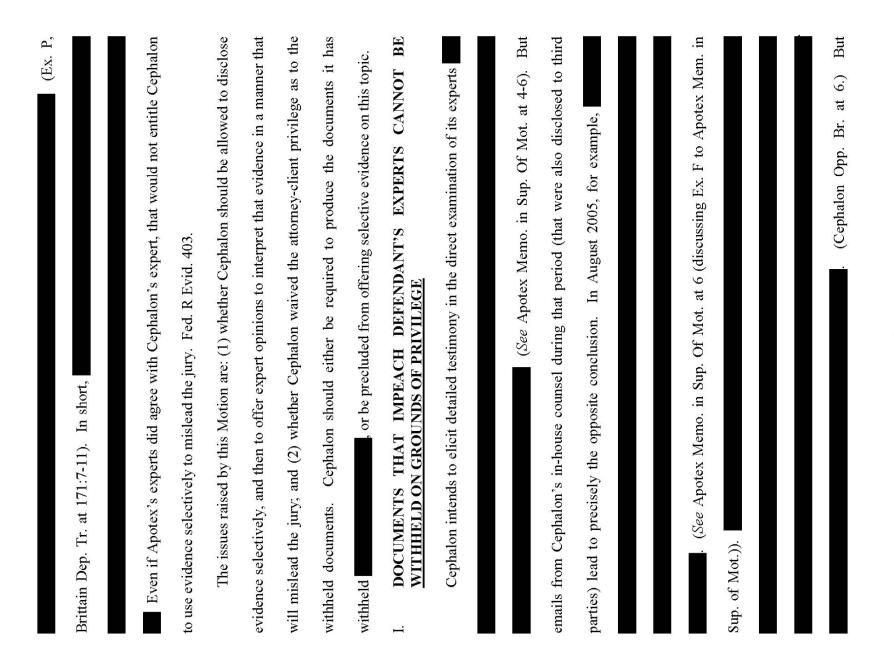
			Civil Action No. 2:06-cv-2768-MSG	CONFIDENTIAL – Filed under seal
APOTEX, INC.,	Plaintiff,	V.	CEPHALON, INC., et al.	Defendants.

REPLY OF PLAINTIFF APOTEX, INC. IN SUPPORT OF ITS MOTION TO PRECLUDE EVIDENCE OR TO COMPEL DISCLOSURE OF CEPHALON DOCUMENTS In its opposition to Apotex's Motion to Preclude Evidence or to Compel Disclosure of The question is whether experts' opinions based on that selective disclosure of evidence, and then to withhold documents on the grounds of privilege that might be used to impeach those experts on the same topic. Allowing Cephalon's experts to testify on that subject free from cross-examination with Moreover, Cephalon waived its privilege when two of its lawyers disclosed their legal direct to introduce impeaching documents would mislead and confuse the jury, and it should not be allowed. to outside competitors, and it will do so again in the wide scope of Cephalon Documents, Defendant Cephalon mischaracterizes the issues. it is fair for Cephalon to disclose selectively evidence about examination of its experts. conclusions

Lacking any legitimate reason why it should be allowed to present misleading, one-sided expert testimony to the jury while withholding potentially key impeaching evidence, Cephalon Cephalon opens its response with a false assertion. attempts to distract and mislead the Court. Namely, Cephalon declares that



Apotex's exhibits to its Motion and opening brief were originally labeled A through M, so Apotex's exhibits attached hereto are labeled N through P.



Cephalon chooses to withhold crucial documents that could refute that conclusion from both their own experts and from plaintiffs' counsel. This is not fair or permissible, because it allows By shielding the impeaching documents under the guise of the attorney-client privilege, Cephalon is presenting This thwarts Apotex's ability to conduct a full cross examination of those expert witnesses and, more misleading expert testimony based on partial evidence selected by its counsel. Cephalon's experts to mislead the jury in violation of Fed. R. Evid. 403. importantly, stifles the jury's ability to consider the evidence fully and fairly

of the In Re MSTG, Inc., 675 F.3d 1337 (Fed. Cir. 2012). In that case, the agreement, but the patentee refused to disclose other documents about these license negotiations because of privilege. Id. at 1340. The court compelled disclosure of those privileged documents According to the Federal Circuit: "[a]s a matter of fairness MSTG [patentee] cannot at one and the same time have its expert rely on information about the settlement negotiations to give the infringer "the ability to test the accuracy" of the expert's opinions and assumptions. In a recent decision by the Federal Circuit Court of Appeals, an alleged infringer of patent sought privileged documents from the patentee in order to cross-examine one patentee's expert relied upon an executive's business reasons for entering into and deny discovery as to those same negotiations." Id. at 1348. patentee's experts. Id. at 1348.

The same point applies here. Cephalon counsel cannot at the same time have its experts and then deny discovery as rely on certain information about matters underlying to those same matters under a cloak of privilege.

1285, 1292 (2d Cir. 1991). Further, a defendant may not use the privilege to prejudice his As The Second Circuit Court of Appeals has also acknowledged that a privilege cannot be used as both a "sword and shield" with respect to an expert witness. In re Bilzerian, 926 F.2d. opponent's case or to disclose some selected communications for self-serving purposes. Id. a result, the privilege may implicitly be waived when defendant asserts a claim that in fairness Significantly, the Court confirmed that "courts cannot sanction the use of the privilege to prevent effective crossexamination on matters reasonably related to those introduced in direct examination." at 1293. Id. requires examination of protected communications.

Any assessment by Cephalon of

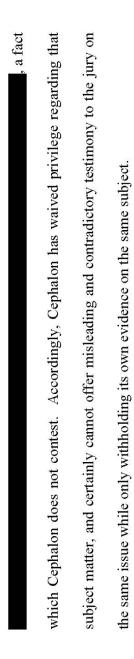
Cephalon cannot have it both ways; it yet stifle effective cross-examination of those experts by withholding documents that can impeach their opinions. If Cephalon were allowed to proceed in this manner, would be closely related to the matters to be elicited on it would blatantly mislead the jury in violation of Fed. R. Evid. 403. cannot elicit on direct examination expert opinions on whether the direct examination of at least three Cephalon experts.

Home Indemnity Company, 32 F.3d 851 (3d Cir. 1994). Rhone-Poulenc was decided a few years after the Second Circuit's Bilzerian and many years before the Federal Circuit's MSTG. None of these decisions are in conflict or even inconsistent. In Rhone-Poulenc, the court simply did not address the issue at hand; it did not deal with the withholding of documents that could be used to cross-examine and to impeach an expert witness. It did not face the question of whether the scope of a direct examination opens the door to the use of otherwise privileged documents for effective cross-examination. It did not even address the question of waiver of attorney client privilege in our context, that is, where lawyers for a party openly disclose their legal conclusions on patent infringement to competitors or to outsiders. Apotex of course has no quarrel with the in Rhone-Poulenc, but that case just does not apply to these Cephalon relies largely on the Third Circuit's decision in Rhone-Poulenc Rorer, Inc. v. Third Circuit's reasoning circumstances Cephalon cannot be allowed to conduct a wide-ranging direct examination of at least a strategic advantage with its experts, but choose to withhold impeaching documents. This result would violate not only Fed. R. Evid. 403, but it would run afoul of both the spirit and letter of the three expert witnesses while it stifles any opportunity by Apotex to conduct a full crossexamination of them. It cannot selectively use certain documents Sixth Amendment.

II. CEPHALON HAS WAIVED PRIVILEGE.

Cephalon audaciously argues that it gains no "unfair advantage" from its selective disclosure, and that its selective disclosure does not enable Cephalon to "present a one-sided story to the Despite this litigation-driven reversal in its position, court" or raise a likelihood of prejudice to Apotex (Id. at 17, 18).

(Cephalon Opp. Br. at 18 (citing In re Keeper of In truth, Cephalon is asking this Court to present just such a one-sided story. Cephalon's attempt to shield its misleading expert testimony from cross-examination is precisely the type of unfair advantage that should be not permitted under Bilzerian and Fed. R. Evid. 403. It raises the same "fikelihood of prejudice" and impediment "to the truth-seeking process" that Cephalon itself implies is not an issue in this case.



The subject matter of

Records, 348 F.3d 16, 24 (1st Cir. 2003).).²

APOTEX'S EXPERTS' TESTIMONY HAVE NO BEARING ON THIS DISPUTE AND THEY DO NOT AGREE WITH CEPHALON'S EXPERTS \equiv

at 1, emphasis supplied). This is plainly false and, even if Cephalon were correct, it would have no (Cephalon Opp. Br. Cephalon irrelevantly argues that relevance to the Motion before this Court.

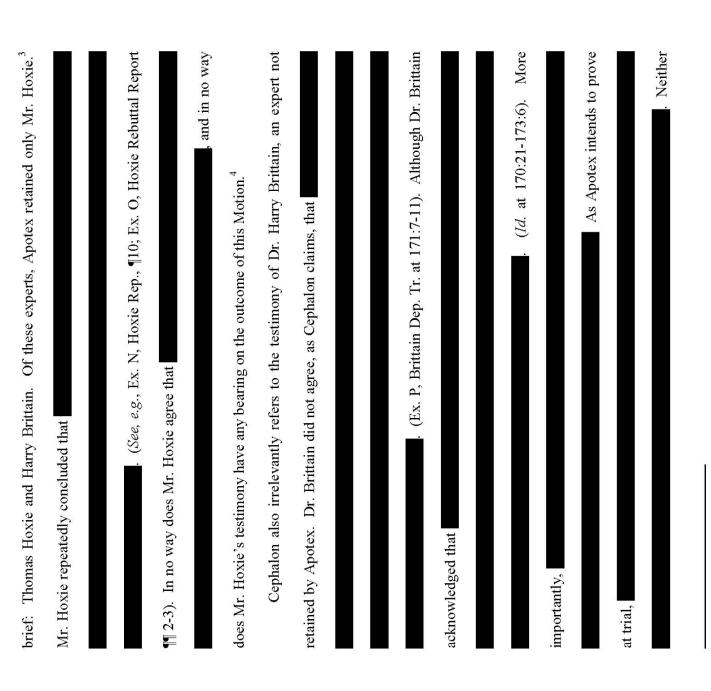
Cephalon has pointed to no case law in which the movant's experts' (supposed) admissions cure a waiver by another party. Cephalon has cited no testimony from Apotex's experts to explain the First, the conclusions of Apotex's experts are completely irrelevant to this Motion. contradiction

In no way does Apotex's expert testimony annul Fed. R. Evid. 403 and permit

Second, Apotex's experts do not agree with Cephalon's experts, as Cephalon has Cephalon cites, out of context, the testimony of two different experts in its opposition claimed.

Cephalon to mislead the jury with expert testimony

² In re Keeper, in addition to not being controlling caselaw, did not involve a party's attempt to offer misleading, selectively disclosed evidence to the jury under the guise of expert testimony while that same party concealed evidence on the same subject matter.



Mr. Hoxie was also retained by other Plaintiffs, some of which also retained Dr. Brittain. Accordingly, some parts of Mr. Hoxie's opinions rely on, inter alia, Dr. Brittain's opinions.

this Cephalon's own expert ⁴ To the extent Cephalon's briefing merely attempts to prospectively discredit Mr. Hoxie, attack is misleading and unavailing in addition to being irrelevant.

Mr. Hoxie's nor Dr. Brittain's testimony cures Cephalon's waiver of privilege or justifies Cephalon's misleading testimony to the jury.

DOCUMENTS REQUESTED IS A RESULT OF CEPHALON'S VAGUE APOTEX'S MOTION IS NOT A FISHING EXPEDITION, AND THE SCOPE OF PRIVILEGE CLAIMS. \mathbb{N}

, but Cephalon refused to do so. (See Apotex Mem. in Sup. of Cephalon dismisses Apotex's Motion as a "fishing expedition" and complains of the burden in camera review may impose on Cephalon and the Court. As Apotex explained in its opening brief, Apotex requested that Cephalon supplement its privilege claims to identify which Mot., at 14; see also Ex. M to Apotex Mem. in Sup. of Mot.).) At the very least, this Court could review in camera a sample of the documents requested by Apotex and identified to Cephalon, potentially beginning with Ex. G to Apotex's opening brief. (See Apotex Mem. in Sup. of Mot., at 6-7 (discussing Ex. G)). Apotex believes the onus to identify which withheld documents should fall on Cephalon, since only Cephalon possesses the information needed to make that determination. Of course, Apotex is open to discuss any potential solution that will assist the Court. documents related to relate to the

V. CONCLUSION.

and it For the foregoing reasons, and for those set forth in Apotex's opening brief, Cephalon has should not be permitted to present misleading testimony of its experts on this subject to the jury while shielding those witnesses from full cross-examination. Fed. R. Evid. 403. Defendant Cephalon should be ordered to produce the documents sought in Apotex's opening motion, or, in the alternative, it should be precluded from offering evidence regarding waived any privilege regarding its

Respectfully submitted,

Plaintiff APOTEX, INC.

By: /s/ Thomas J. Maas One of its Attorneys

December 24, 2012

Dated:

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Thomas J. Maas

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APOTEX, INC.,	
) Plaintiff)	
	CIVIL ACTION
V.)	
	No. 2:06-cv-2768-MSC
CEPHALON, INC., et al.	
Defendants)	

CERTIFICATE OF SERVICE

I certify that on December 24, 2012, a copy of Reply of Plaintiff Apotex, Inc. in Support of its Motion to Preclude Evidence of to Compel Disclosure of Cephalon Documents was served via the Court's ECF system and via e-mail.

Dated: December 24, 2012

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